SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

September Term, 1974

No. 73-1045

LUIS CHARBONIER and
RAUL CHARBONIER,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

	Page
OPINION BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
CONCISE STATEMENT OF THE CASE CONCERNING FACTS MATERIAL TO QUESTIONS PRESENTED	3
REASONS FOR GRANTING THE WRIT	11
APPENDIX	
JUDGMENT OF THE FIFTH CIRCUIT COURT	App. 1
DENIAL OF PETITION FOR REHEARING	App. 2
COPY OF INDICTMENT	App. 4
JUDGMENT OF ACQUITTAL	App. 5
UNITED STATES OF AMERICA VS. CHARBONIER	App. 6
Appendix 6 Omitted from Brief Per Directions of Clerk	
SCIENTIFIC REPORT CONCERNING BLOOD	App. 7

CITATIONS

CASES	Page
Chapman vs. State of California, 87 S.Ct. 824	14, 15
Dugan Drugstore, Inc. vs. United States, 326 F2d 835	13
Fahy vs. State of Connecticut, 84 S.Ct. 229	14
Ginsburg vs. United States, 257 F2d 950	13
Griffin vs. State of California, 85 S.Ct. 1229	10
Kotteakos vs. United States, 66 S.Ct. 1239	14
Odom vs. United States, 377 F2d 853	14
United States vs. Antonelli, Fireworks Company, 155 F2d 631, 661	13
United States vs. Haynes, 466 F2d 260	13, 14
United States vs. Kasouris, 474 F2d 689	4, 12
United States vs. Ragano, 476 F2d 410	12
Wagner vs. United States 363 F2d 877	14

CONSTITUTION

	Page
Constitution of the United States, Amendments 5, 6, 14	2, 3, 10

STATUTES

Title 28 U.S.C. Section 1254(1)	2
Title 18 Section 2, 892	3
Title 18 Section 2, 894	3
Title 18 Section 2, 1952	3

MISCELLANEOUS

Supreme Court Rule 19B (2)	2
Supreme Court Rule 23(1)(e)	4
Devitt and Blackmar - Federal Jury Instructions, Section 12.03	2, 10
Courtroom Misconduct by prosecutors and Trial Judges, by Albert W. Alschuler, TEXAS LAW REVIEW, Volume 50, No. 4, April, 1972	14

IN THE

Supreme Court of the United States

SEPTEMBER TERM 1974

NO. 73-1045

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

RAUL CHARBONIER and LUIS CHARBONIER,

Defendants-Appellants.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioners, Raul Charbonier and Luis Charbonier respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, which opinion was rendered on June 12, 1974 and Petition for Rehearing was denied on August 9, 1974.

OPINION BELOW

The Opinion of the Fifth Circuit Court of Appeals is reported at 495 F 2nd 1226 attached hereto and incorporated herein.

JURISDICTION

The judgment of the Court of Appeals was entered on June 12, 1974. The Petition for Rehearing was denied on August 9, 1974. (Appendix 2)

This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1) and Rule 19(b) of the Supreme Court of the United States.

QUESTIONS PRESENTED

First. Whether the prosecutorial misconduct in this cause denied the defendants' right to a fair trial and due process of law.

Second. Whether the statement made by the Government prosecutor during his summary argument that

> "defense counsel stated that while they were not there and I wasn't there - I want to point out to you, Ladies and Gentlemen, that the people who were there were all the witnesses who testified to the facts and all of the defendants, and they were there when this occurred; And you have the testimony as to what happened"

violated the self-incrimination clause of the United States Constitution as a direct or indirect comment on their failure to testify in violation of the Fifth Amendment of the United States Constitution.

Third. Did the Court deny the defendants a fair trial by refusing to give the following requested instructions to-wit:

1. "The testimony of an admitted perjurer should always be considered with caution and weighed with great care." Federal Jury Practice and Instructions, Devitt and Blackmar, § 12.03

2. The Falsus in Uno and Falsus in Omnibus instruction.

particularly when a key government witness, Fano Ciaccio admitted lying under oath when these very defendants were on trial in the State Court and further when the prosecutor in this cause had to advise the jury that the witness was lying under oath before the Trial Court in this case.

Fourth. The same constitutional issues raised in the Petition for a Writ of Certiorari by the Petitioners, James Burke, Louis Lopez and Henry Hill, in Case No. 72-3742 which was consolidated with Case No. 73-1045 before the Fifth Circuit.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

CONCISE STATEMENT OF THE CASE CONCERNING FACTS MATERIAL TO QUESTIONS PRESENTED

The Federal Grand Jury, for the Middle District of Florida, indicted the Petitioners in a five count indictment, charging the Petitioners, Raul Charbonier and Luis Charbonier, in Count I with violations of Section 2 and 892 of Title 18 of the United States Code; in Count II with violations of Section 2 and 894, Title 18 of the United States Code; in Count III with violations of Section 2 and 1952 of Title 18 of the United States Code; in Count IV with violations of Section 2 and 1952 of Title 18 of the United States Code; and in Count V with violation of Section 2 and 1952 of Title 18 of the United States Code. (Appendix 4, pp. 1-5)

The trial commenced in the Middle District of Florida before the Honorable Ben Krentzman and concluded

on November 2, 1972, with a finding by the jury that the Petitioners, Raul Charbonier and Luis Charbonier were guiity of all Counts of the Indictment. Petitioners, Raul Charbonier and Luis Charbonier were sentenced to a term of 10 years each on Counts I and II and five years each on Counts III, IV and V, all to run concurrent with the sentences imposed in Count I.

A Motion for New Trial was timely filed and denied. Petitioners appealed to the Fifth Circuit Court of Appeals which Appeal was denied as was the Petitioners' Petition for Rehearing.

That the State of Florida did indict the Petitioners for the alleged offenses of assault with intent to commit murder in the first degree, kidnapping and extortion, which offenses allegedly involved not only the same defendants, but the exact same circumstances upon which the Federal indictment was predicated. That said defendants were tried by the State of Florida and acquitted on all charges. (Appendix 5)

In compliance with Rule 23(1)(e), the following matters are material to the consideration of Question Number One:

Bernard Dempsey, the prosecutor in the case at bar, manifested a flagrant disregard for due process of law and the concept of a fair trial just as he did in the case of *United States vs. Kasouris*, 474 F.2d 689, Fifth Circuit Court of Appeals, Case No. 71-3569, when the Fifth Circuit said:

> "That the trial tactics of the prosecutor (Bernard Dempsey), as evidenced by the record, indicate a disregard for the fundamentals of due process."

That in the case at bar the prosecutor, without any notice to defense counsel, artfully, indelibly and unscrupulously solicited prejudicial matters on re-direct examination concerning money on the person of the victim, implying said money was covered with blood, which the victim allegedly had on his person the evening of the offense. The accusation of wrong doing is predicated upon the following reasons:

1. That the dollar bills were never shown to the defense counsel pursuant to the discovery order or ever referred to either on direct examination or cross-examination.

2. That the prosecutor should have taken the matters up outside the presence of the jury, knowing that the same would create a prejudicial issue, but he chose not to, knowing that "once you throw a skunk into the jury box, you can't instruct the jury not to smell it". (Appendix 6, p. 42)

3. That even after the admonishment of the Court and the objections to such inquiry sustained, the prosecutor once again disregarded the Court's admonishment and very adroitly solicited the prejudicial matter that the Court had sustained.

4. That notwithstanding the Court sustaining two objections to this unfair solicitation of prejudicial testimony, the prosecutor once again referred to it in his final argument by saying:

> "But I do recall that, after Gasper Ciaccio on the witness stand said on his person then, as testifying, he had something which he was carrying on the night of his beating, *that you (addressing the jury) were not permitted to have that object or evidence*

because of objection by defense counsel." (p. 39-Rebuttal) (Emphasis supplied) (Appendix 6, pp. 24, 25, 26, 27, & 28)

A second manifestation of prosecutorial misconduct which contributed to denying the defendants a fair trial in this cause was when the prosecutor suggested to the jury the existence of damaging evidence, and which, in fact, there was no such evidence offered other than the expressed representation of said evidence in front of the jury. More specifically, when defense counsel for the Charboniers was questioning the FBI agent concerning a conflict between the complaining witness telling the agent that the car in which the "alleged beating took place was a bloody mess", and that upon examination by the FBI there was no blood found in the car, the prosecutor stood up and stated an objection and said:

"I suggest the question is improper. It is untrue, but also improper." (Appendix 6, p. 28)

The wrongdoing is predicated upon the following:

1. That the prosecutor by such statement did tell the jury that there was blood found in the car and there was never any evidence of that in the trial.

2. That the Government had furnished defense counsel, prior to trial, an FBI document from the FBI laboratory indicating that no blood was found in the automobile, which was the only document provided defense counsel concerning matters relating to blood in the car. (Appendix 6, pp. 28, 29 & 30) (Appendix 7)

3. Mr. Dempsey further indicated during his final argument that defense counsel knew that blood had been found in the automobile. (Appendix 6, p. 30)

4. Mr. Dempsey further prejudiced the case by a very emotional argument concerning the fears of Dr. LoCicero's family *even to this day* during his closing argument, (Appendix 6, p. 38), and further compounded this "present fear" emotional argument when he solicited from witness Ciaccio his present fear of Raul and Luis Charbonier. (Appendix 6, pp. 34, 36) The basis for the wrongdoing is that:

(a) There was no evidence as to the fears of Dr. LoCicero's family introduced at any time during the trial, and the emotional approach was devestating despite the instruction to disregard.

(b) That the fear of Mr. Ciaccio at the time of the trial of Raul and Luis Charbonier was not relevant or material, *as the Court ruled,* and was only offered to suggest to the jury that there was a possible danger to Ciaccio if the defendants were acquitted.

5. That during the trial, FBI Agent Robert Buresh, volunteered an unresponsive answer on cross-examination suggesting that the case had "organized crime overtones" which response was artfully and indelibly planted in the minds of the jurors. This response created the dilemma of striking the same and causing more attention to it for letting it stand without instruction to disregard it - again prejudicing the natural hate for the defendants. (Appendix 6, p. 61)

6. Another gross expression of prosecutorial misconduct on the part of the prosecutor occurred during his opening statement when he advised the jury that they would hear evidence that showed that these defendants "specialized in this activity" referring to one who works people over to collect gambling debts. (Appendix 6, p. 40) The basis for the accusation of wrongdoing is predicated on:

(a) There was, in fact, no such evidence during the trial to support the unfounded statement of the prosecutor.

(b) this statement was made solely to inculcate a natural hatred on the part of the jurors directed toward the defendants.

7. Another act of misconduct on the part of the prosecutor was the allegation directed toward the attorney for Raul and Luis Charbonier in the presence of the jury, that a question on cross-examination was asked in "bad faith". That the Court made an expressed finding that said counsel was not acting in bad faith and it is submitted that the accusation of bad faith was another factor to contribute to prosecutorial misconduct during the trial. (Appendix 6, p. 37)

8. Another expression of prosecutorial misconduct is when the prosecutor solicited from the primary government witness, Gaspar Ciaccio, why he made a recording of the events that occurred on the night of the alleged offense, which solicitation included the response "because if anything happened to me, my wife would know what happened." The basis of the accusation for the allegation of wrongdoing is that such a remark was induced to prejudice the minds of the jury, particularly when it was learned later in the trial, after listening to the tapes outside the presence of the jury, that Gaspar Ciaccio's wife actually participated in the making of the recordings. (Appendix 6, p. 30 & 31)

9. That the prosecutor again solicited canned and prejudicial testimony when he asked a key government witness, Fano Ciaccio, on direct examination in an attempt to cushion the cross examination, why he lied in the State Court proceedings under oath about knowing

that his brother had been gambling in 1970, to which Mr. Dempsey solicited the response, "Because I was scared of the same thing happened to him that happened to my brother." The devil in this solicitation becomes noteworthy when it is learned by the own admission of the witness, that he went over the testimony at least four or five times in two to four hour sessions at a time with the prosecutor. (Appendix 6, p. 53). He gave much more damaging evidence directed toward the defendants in this cause, which he alleges as being truthful, thus making it incomprehensible that he would lie as to a relatively innocuous point. It is totally untenable from a standpoint of logic, and it is further submitted to this Court that the same is solicited on the part of the prosecutor only to prejudice the defendants in this cause. (Appendix 6, p. 31 and 32)

10. Another event instituted by the prosecutor in this cause occurred when he was allowed to "work with Fano Ciacio, over the weekend" and get him ready for the cross-examination after the witness had been tendered to defense counsel for cross-examination, but prior to cross-examination actually beginning. (Appendix 6, p. 53)

The following matters are relevant to the consideration of Questions Number One and Two:

That during rebuttal argument the prosecutor stated to the jury:

> "Defense counsel stated that, they were not there and he wasn't there - I want to point out to you, Ladies and Gentlemen, that the people who were there were all the witnesses who testified to the facts and all of the defendants, and they were there when this occurred; and you have the testimony as to what happened."

That not only does the prosecutor's comment contribute to the denial of a fair trial under the theory of prosecutor's misconduct, but further is a violation of the Fifth Amendment clause of the United States Constitution as it is a comment on the failure of the defendant to testify in his own behalf. *Griffin vs. State of California,* 85 S.Ct. 1229 (1965)

The following matters are relevant to the consideration of Question Number Three:

That government witness, Fano Ciaccio, admitted before the Trial Court that he lied under oath in the State proceedings involving the same defendants and same transactions, which formed the basis of the Federal Indictment in the case at bar.

That during the cross examination of Fano Ciaccio during the case at bar, it was so obvious that he was lying in this case that the government prosecutor stood up and said so in the presence of the jury.[1] (Appendix 6, p. 34)

That in view of the complete disregard for the sanctity and in view of the spirit and reasoning of the instruction that a convicted perjurer's testimony should be weighed with caution and great care, the undersigned attorney requested the instruction as follows:

> "That the testimony of an admitted perjurer should always be considered with caution and weighed with great care." Federal Jury Practice and Instructions, Devitt and Blackmar, §12.03.

which was denied as was the instruction of Falsus In Uno and Falsus In Omnibus requested and denied.

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[1] This admission on the part of the prosecutor is not as sanctimonious or laudible as it appears on the surface. See pp. 33, 34, 35, 36, & 37 of Appendix 6.

REASONS FOR GRANTING THE WRIT

This Court is faced with an issue which is more crucial than it may appear on the surface, not only crucial to the defendants in this cause, in that they were denied a fair trial because of the misconduct of the prosecutor during the trial process; but equally as important, this Court must, in the interest of protecting future defendants from prosecutorial misconduct, re-examine the basic rules of Appellate practice as they apply to cases of prosecutorial misconduct. It is submitted that the judicial reality of our times is that the Courts are overcrowded; the trial dockets are full; the dockets of the appellate Courts are crowded and congested. The Courts, both trial Courts and appellate Courts, are becoming more conscious of "economy" and "judicial administration" which permit the trial and appellate Courts to tolerate and excuse acts of prosecutorial misconduct and serve to condone such statements as quoted by the Fifth Circuit Court of Appeals in this cause, when they said about the prosecutorial misconduct complained of:

> "after reviewing the record of the incidents, statements and arguments alleged to have been prejudicial, we conclude that they were not so misleading, inflammatory or prejudicial as to deny the defendants a fair trial."

This Court must put all trial Judges, all appellate Courts and all prosecutors on notice that this Court is just as conscious of protecting one's rights to a fair trial when said right has been violated by the misconduct of a prosecutor during the trial of the cause, as it is when the right is violated by a law enforcement officer, whether it be through an illegal search and seizure, or an improper inducement of any

illegal confession. That trial Judges, appellate Courts and prosecutors must be put on notice that this Court will not allow "harmless error rationalizations", concerns with "judicial economy", or other meaningless sweeping euphemisms, such as:

> ". . . we conclude that they were not so misleading, inflammatory or prejudicial as to deny defendants a fair trial."

Can it not be said that when the trial Judge knows the Supreme Court of the United States is serious about protecting the right of a fair trial of every defendant and preventing prosecutorial misconduct, that said trial Judge will make that concept known to the trial prosecutor and thus the trial prosecutor will not continue to push to the "outer limits of legality" as the same prosecutor (Bernard Dempsey) did in *United States vs. Ragano,* 476 F.2d 410, and as he did in *United States vs. Kasouris,* 474 F.2d 689, where the appellate Court said:

> "That the trial tactics of the prosecutor (Bernard Dempsey), as evidenced by the record, indicate a disregard for the fundamentals of due process."

Prosecutors will know that the trial Judges of the appellate Courts will no longer tolerate Constitutional infirmaties, will no longer rationalize, will no longer be concerned with economy and will no longer be concerned with "judicial administration" which have also been excuses utilized by our Courts in tolerating prosecutorial misconduct.[2] It is submitted to this Court, the highest Court of our land, that tribute should be paid to the words of Judge Jerome Frank,

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[2] "Courtroom Misconduct by Prosecutors and Trial Judges, by Albert W. Alschuler, TEXAS LAW REVIEW, Volume 50, No. 4, April, 1972.

as expressed in his dissenting opinion in *United States vs. Antonelli, Fireworks Company,* 155 F.2d 631, 661, in which he said:

> "This Court has several times used vigorous language in denouncing government counsel for such conduct as that of the United States Attorney here. But, each time, it has said that, nevertheless, it would not reverse. Such an attitude of helpless piety is, I think, undesirable . . . If we continue to do nothing practical to prevent such conduct, we should cease to disapprove it . . . Government counsel, employing such tactics, are the kind who, eager to win victories, will gladly pay the small price of ritualistic verbal spanking. The practice of this Court-recalling the bitter tear shed by the Walrus as he ate the oysters-breathes a deplorable cynical attitude toward the judiciary.

The case at bar is probably an excellent example of the attitude of trial Courts and appellate Courts where they, as humans, feel that the defendants are "probably guilty anyway" and do engage in rationalizations in order to justify the conclusions desirable. For example, the Court below adopted the government's complete preface of the statement of facts, expressed their own opinion as to the "crudeness of the scheme", concern themselves with judicial economy and administration and intentionally refuse to meet the issue of prosecutorial misconduct only to say that:

> ". . . we conclude that they were not so misleading, inflammatory or prejudicial as to deny defendants a fair trial."

That the Fifth Circuit in this cause, disregarded the precedent that they set in *Ginsburg vs. United States,* 257 F.2d 950; *Dugan Drug Stores, Inc. vs. United States,* 326 F.2d 835, (1964); *United States vs. Haynes,*

466 F.2d 1260, (1972); and *Odom vs. United States,* 377 F.2d 853. That in analogy, which the writer would consider directly in point with the case at bar, is the case of *Wagner vs. United States,* 363 F.2d 877, in which the prosecutor said during his closing argument:

> "They didn't let me do that. They objected."

and the Fifth Circuit held:

> "Defendant's case should not be prejudiced by criticizing their counsel for making reasonable objections to the introduction of testimony. Further, this criticism had a tendency to prejudice the defendants if their counsel should object to parts of the oral argument as improper."

Whereas, in the case at bar, that same course of conduct was only one of the many expressions of prosecutorial misconduct on the part of the prosecutor.

This Court can not allow other Courts to allocate due process of law to whomever defendants they so desire depending upon their own personal feelings as to the guilt or innocence of the accused or whatever equities may be involved in the cause. This Court must compel the compliance with the meaning and spirit of its prior decisions, such as in *Kotteakos vs. United States,* (66 S.Ct. 1239):

> "But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected."

The Court further said in *Fahy vs. State of Connecticut,* 84 S.Ct. 229, and later adopted in *Chapman vs. State of California,* 87 S.Ct. 824, (1967), as follows:

> ". . . before a federal constitutional error can be held harmless, the Court must be able to declare a belief that it was harmless beyond a reasonable doubt."

It is submitted to this Court that, under the facts of this case, no Court could say beyond a reasonable doubt that the trial jury was not swayed by the misconduct of the prosecutor. *Chapman vs. State of California, supra.* Justice would be well served for this Court to take certiorari, review the record and ultimately place the umbrella of condemnation upon prosecutorial misconduct once and for all.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that in accordance with Rule 33 of the Rules of this Court, on the 9th day of September, 1974, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to the Solicitor General, United States Department of Justice, Washington, D.C. 20530, and three additional copies were mailed to United States Attorney, Federal Building, Tampa, Florida. I further certify that all parties required to be served have been served.

BARRY A. COHEN